Supreme Court, U.S.
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No. 01-1586

In the Supreme Court of the United States

LYN EVERHART,

Petitioner,

v.

ALLMERICA FINANCIAL LIFE INSURANCE COMPANY, DOING BUSINESS AS STATE MUTUAL LIFE ASSURANCE COMPANY OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REASONS FOR GRANTING THE WRIT

Despite respondent's efforts to cloud the issue with extraneous factual assertions, the question presented by this petition and the question addressed by the Ninth Circuit are identical -- whether § 502(a)(1)(B) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132(a)(1)(B), authorizes the beneficiary of an insurance policy purchased under an ERISA employee benefits plan to assert a claim for benefits against the insurance carrier. *See, Everhart v. Allmerica Financial Life Insurance Company*, 275 F.3d 751, 752 (9th Cir. 2001), Petitioner's Appendix B at 6a. That question is properly addressed by this Court on the two grounds discussed at length in the petition: (1) the existence of conflicting and confusing case law among and even within the Circuits, and (2) the existence of an important question of national importance involving the proper interpretation and application of ERISA never previously settled by this Court. Supreme Court Rule 10(a), (c). There is nothing "advisory" about such issues which have been joined in the courts below.

I. Confusion Among the Circuits

Respondent acknowledges two of the three conflicting lines of authority regarding who can be sued for ERISA plan benefits: those cases holding that only the plan itself can be sued, and later cases holding that benefits claims may be asserted against the party controlling plan administration. The first line of cases originated with *Gelardi v. Pertec Computer Corp.*, 761 F.2d 1323, 1324 (9th Cir. 1985). The Ninth Circuit has itself questioned the continued vitality of that first line of cases in light of this Court's recent holding in *Harris Trust and Savings Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 246 (2000), that ERISA "admits of no limit on

the universe of possible defendants." *Everhart,* 275 F.3d at 754, n. 3, Petitioner's Appendix B at 11a-12a.

Respondent erroneously argues that there is not a further split among the circuits by the third line of cases allowing claims against ERISA plan insurers. In each of the Third and Ninth Circuit cases cited by petitioner, implicit in the Courts of Appeals' opinions is the holding that such insurer liability must exist.[1]

In *Curcio v. John Hancock Mutual Life Insurance Co.*, 33 F.3d 226 (3d Cir. 1994), defendant John Hancock Mutual Life was sued in one capacity only -- as the issuer of an ERISA benefits insurance policy. *Id.* at 229. In determining to reverse the district court's ruling that John Hancock could be held liable for payment of those benefits, the Third Circuit performed a painstaking analysis of the policy language to determine whether coverage existed. *Id.* at 231-232. Such an analysis would have been completely unnecessary unless the Third Circuit recognized that ERISA imposed individual liability upon insurers for promised plan benefits under § 502(a)(1)(B).

The most notable of the Ninth Circuit cases allowing individual liability of an insurer is *Forsyth v. Humana, Inc.*, 114 F.3d 1467 (9th Cir. 1997), *aff'd sub nom. Humana, Inc. v. Forsyth*, 525 U.S. 299 (1999). In *Forsyth*, the panel expressly authorized a "benefits breach of contract claim under [29 U.S.C.] section 1132(a)(1) of ERISA," i.e. under § 502(a)(1)(B). *Id.* at 1475. Respondent disregards the prior

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[1] This Court recognizes such implicit holdings, including in its analysis of its own earlier decisions. *E.g., Lilly v. Virginia*, 527 U.S. 116, 134 n. 5 (1999); *United States v. Stanley*, 483 U.S. 669, 681 (1987).

history of the case in arguing that the Ninth Circuit's holding was based upon some determination that the insurer "functioned as the plan administrator." The beneficiary/plaintiffs had initially asserted two distinct ERISA claims: (1) a claim that the insurance carrier "breached its contract with them, and violated the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001, *et seq.*," and (2) that "the defendants violated ERISA by breaching fiduciary duties . . ." *Id.* at 1472. The district court had dismissed the breach of fiduciary duty claim, which dismissal was affirmed on appeal. *Id.* at 1475. There was no suggestion whatsoever that the court's decision was based upon any finding or assumption that the insurer had "functioned as the plan administrator."

In *Ward v. Management Analysis Company Employee Disability Benefit Plan*, 135 F.3d 1276 (9th Cir. 1998), the Ninth Circuit again permitted a benefits action against a plan's insurer, UNUM. Respondent correctly asserts that insurers sometimes provide a defense for and appear on behalf of a benefits plan, but ignores the fact that, in *Ward*, UNUM appeared not only for the plan, ***but also on behalf of itself***. *Id.* at 1279. Such a personal appearance was necessary only if there was individual liability of UNUM as an insurer. *See, also, Cisneros v. UNUM Life Ins. Co.*, 134 F.3d 939 (9th Cir. 1998).

Respondent also cites numerous cases in an effort to imply that a "legion of cases" has determined that insurers have no ERISA benefits liability. In virtually every such case cited by respondent, however, there was no issue of an

insurer's individual liability because either the plan was self-insured[2] or no insurer of the benefits was named as a party.[3]

There is unquestionably a split of authority among the Circuits concerning who is a proper defendant in an ERISA benefits claim under § 502(a)(1)(B). The present case squarely and simply frames the issue for resolution by this Court.

II. Exceptional National Importance

Respondent fails to address this ground, independent of the split among the Circuits, that supports granting the petition. ~~The U.S.~~ Department of Labor statistics cited in the petition demonstrate without contradiction the vast number of ERISA beneficiaries, plans, and insurers that are affected by the issue presented here. The need clearly exists for this Court to clarify the application of ERISA upon insurers'

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[2] *Spain v. Aetna Life Ins. Co.*, 13 F.3d 310 (9th Cir. 1993); *Gibson v. Prudential Life Ins. Co.*, 915 F.2d 414 (9th Cir. 1990); *Madden v. ITT Long Term Disability Plan*, 914 F.2d 1279 (9th Cir. 1990); *Lee v. Burkhart*, 991 F.2d 1004, 1009 (2d Cir. 1996); *Auto Club Ins. Assn. v. Safeco Life Ins. Co.*, 833 F.Supp. 637, 638, 640 (W.D. Mich. 1993).

[3] *Riordan v. Commonwealth Edison Co.*, 128 F.3d 549 (7th Cir. 1997); *Hupp v. Experian Corp.*, 108 F.Supp.2d 1008 (N.D. Ill. 2000); *Holland v. Bank of America*, 673 F.Supp. 1511 (S.D. Cal. 1987); *Murphy v. Wal-Mart Assocs. Group Health Plan*, 928 F.Supp. 700 (E.D. Tex. 1996); *Crawford v. Exxon Corp.*, 851 F.Supp. 242 (M.D. La. 1994); *Holloway v. HECI Exploration Co. Employee's Profit Sharing Plan*, 76 B.R. 563 (N.D. Tex. 1987).

liability for benefits as part of the development of a uniform federal common law, as intended by Congress.

III. Insurers Are Subject to Suits for Benefits Under ERISA

Respondent asserts that § 502(d), 29 U.S.C. § 1132(d), cannot include the liability of an ERISA plan insurer, simply ignoring the express statutory language providing for "liability against such person [that] is established in his individual capacity under this subchapter." Insurers well know that, in issuing policies of insurance, they promise to provide benefits in return for the premiums they receive, and risk suit if they fail to deliver those benefits. In providing that ERISA benefits could be funded by insurance, Congress was certainly aware of the uniform national rule that insurers can be sued for benefits by the beneficiaries of insurance policies. Had Congress wished to immunize insurers from such liability, it would have done so explicitly, rather than adopting the language of § 502(d) allowing a broad range of defendants to be held liable for money judgments.

Contrary to respondent's argument, no inconsistency exists between the remedies for self-funded and insured plans, nor does this petition seek to create one. In both types of funding mechanisms, § 502(d) provides that the person responsible for payment of the benefits is subject to liability for a money judgment when those benefits are denied. In the case of a self-funded plan, the plan itself insures the benefits, and is therefore liable. In the case of an insured plan, both the plan and the insurer guarantee to the beneficiary that the promised benefits will be paid. Hence, both are liable. This liability is not any "forgotten" remedy, but was specifically intended by Congress when it authorized both that ERISA benefits could be funded by insurance and that liability would

be imposed upon any party where "established in his individual capacity." § 502(d).

Nor is this a case where petitioner seeks extracontractual damages beyond those expressly authorized by Congress. *Compare, Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985). On the contrary, in §502(a)(1)(B), Congress has specifically authorized a beneficiary to file an action to recover benefits due under the terms of the plan, which is precisely what petitioner seeks. *Id.* at 146-147.

Finally, there is no risk of duplicative actions, as suggested by respondent. Under the usual joinder rules, a beneficiary would be entitled to join both the plan and the insurer in a suit for recovery of the promised benefits. Fed.R.Civ.P. 20. Similarly, a plan or insurer sued for benefits, and claiming that the other is liable for those benefits, would be entitled to bring the other into the case through a third party complaint. Fed.R.Civ.P. 14.[4] The relief petitioner requests actually promotes finality by assuring that an ERISA beneficiary may join all potential payors in a § 502(a)(1)(B) benefits action, thus advancing Congress' intent to enhance protection of the interests of plan participants and beneficiaries. *Varity v. Howe*, 516 U.S. 489, 497, 513 (1996).

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[4] There was no prior litigation here. As both parties state in their submissions, petitioner entered into a pre-litigation settlement with her deceased husband's employer.

Respectfully submitted,

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